No. 20904

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corporation, formerly Ward Industries Corporation,

Appellant,

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE

UNION TANK CAR COMPANY

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF OF APPELLEE

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This is an appeal by defendant-counterclaimant, DRAGOR SHIPPING CORPORATION (Dragor), formerly named Ward Industries Corporation, from a December 7, 1965 judgment entered by the court below dismissing for want of prosecution Dragor's compulsory counterclaim against plaintiff-counterdefendant, UNION TANK CAR COMPANY (Union). The dismissal was caused by Dragor's deliberate refusal to appear before the court below on the December 7 trial date, or to present any evidence in support of its counterclaim, and consequent abandonment of its counterclaim. (R.2, p. 205).[1]

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[1] Union, in this brief, has employed the same record reference system described in Dragor's brief, at p. 2.

JURISDICTIONAL STATEMENT

Jurisdiction of the court below over the subject matter of Dragor's counterclaim was based on diversity of citizenship, 28 U.S.C., § 1332. Dragor is a Delaware corporation, with its principal place of business in New York. Union is a New Jersey corporation, with its principal place of business in Illinois. The amount in controversy exceeds $10,000 exclusive of interest and costs. (R.1, p. 105).

Jurisdiction of this appeal is asserted pursuant to 28 U.S.C. §§ 1291 and 2107. Notice of appeal from the December 7, 1965 judgment was filed on December 15, 1965. Dragor filed its opening brief on September 7, 1966. No time extensions were requested by appellant or granted by this Court or the court below.

STATEMENT OF THE CASE

This appeal arises out of litigation involving Arizona transactions previously considered in part on Appeal No. 20,416, decided by this Court on April 7, 1966, and reported in 361 F.2d 43.[2] The facts concerning inception of the controversy there reviewed in the Court's opinion are equally pertinent here. The facts as stated in Appellant's brief are incomplete and misleading, hence this re-statement of the case.

Inception of The Controversy.

On September 8, 1961, Union entered into a $16,800,000 first tier subcontract with The Fluor Corporation, Ltd., to provide work and material in connection with the installation of eighteen Atlas Titan missile silos in the vicinity of the Davis-Monthan Air Force Base near Tucson, Arizona. (R.2, pp. 189, 190).

A substantial part of the work undertaken by Union pursuant to its contract with Fluor was in turn subcontracted to a joint venture formed by Dragor and Idaho-Maryland Industries, Inc. (IMI), a California construction firm, pursuant to a $7,800,000 second tier subcontract executed on October 23, 1961 (R.2, p. 192). During the performance of the work IMI filed a petition under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of California, Central Division (R.2, p. 191).

By reason of IMI's bankruptcy and Dragor's refusal to complete the work, Union was forced to take over and complete the joint venture subcontract at a cost which eventually exceeded the joint venture sub-

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[2] Union's petition for writ of certiorari to review the judgment of this Court is now pending before the Supreme Court of the United States (Docket No. 283). This Court, by order dated June 2, 1966, stayed its mandate pending disposition of the certiorari petition.

contract by more than $9,000,000. In consequence, Union, in May, 1962, filed a diversity action against Dragor in the United States District Court for the Northern District of Illinois, Eastern Division, in order to recover its losses then incurred and in prospect. Dragor appeared and moved to transfer the action to the United States District Court in Tucson, Arizona, on the ground that all matters involved in the action originated in Tucson (R.2, p. 192). After the case was so transferred, Dragor instituted a separate action against Union in the same Arizona District Court, seeking rescission of the construction contract and damages (R.1, pp. 5-8). *Union Tank Car Company* v. *Ward Industries Corporation,* Civ. No. 1482 - Tuc.; *Ward Industries Corporation* v. *Union Tank Car Company,* Civ. No. 1478-Tuc.

While these two actions were pending before the Arizona District Court, Mosher Steel Company also sued Dragor and Union in the same court, seeking to recover $300,000 for fabricated steel sold to the joint venture for use in the joint venture subcontract work. Mosher contended that Union, in addition to Dragor and IMI, was liable for payment either as a co-principal or a guarantor. *Mosher Steel Company* v. *Fluor Corporation, Ltd., et al.,* Civ. No. 1605-Tuc.

On October 3, 1963, following the completion of discovery and shortly before the date set for trial in Case No. 1482-Tuc. and while Dragor was still licensed to transact business in Arizona, the parties entered into a settlement agreement (R.1, p. 2) to dispose of matters in controversy between them and then involved in the Tucson litigation.

Under the terms of the settlement agreement Union agreed (1) to give Dragor a general release of all claims and demands with the exception of the claim in suit in the Mosher Steel Company case, in connec-

tion with which, as a separate transaction, Dragor was given a covenant not to sue, and (2) to execute and deliver a stipulation to dismiss with prejudice its $9,000,000 action against Dragor in the United States District Court in Tucson.

Dragor, in turn, agreed (1) to give Union a general release; (2) to cause the dismissal of a suit brought against Union in Los Angeles, California, by the United California Bank as assignee of certain joint venture invoices; (3) to pay Union on or before September 30, 1964, the sum of $1,000,000, with interest at the rate of Five Percent from January 1, 1964 to the date of maturity, and at the rate of Seven Percent after maturity, the indebtedness to be evidenced by a promissory note payable to Union and to be guaranteed by Jakob Isbrandtsen; and (4) to make an absolute assignment to Union all of the IMI-Ward joint venture's contract adjustment claims against the United States Government, arising out of the Titan II missile launch facility construction work. (R.1, p. 2).

Under the settlement agreement the parties agreed that in the event Union realized in excess of $7,000,000 from its own contract adjustment claims and the assigned joint venture contract adjustment claims, Dragor would receive 10% *(and Union would retain 90%)* of all claim payments above $7,000,000 and up to $12,000,000, and 50% of all claim payments between $12,000,000 and $14,000,000. The settlement agreement required (R.1, p. 8) payment of the note on September 30, 1964 even though the claims against the United States government were not finally determined and paid by that date.[3]

[3] The United States Government, acting through the Corps of Engineers, to the present date has never allowed anywhere near $7,000,000 on the contract adjustment claims. The Corps of Engineers decisions are under appeal by Union and are the subject of pending administrative review proceedings. (R.2, p. 195).

Following settlement of the then pending Tucson litigation between Dragor and Union, the action brought by Mosher Steel Company against Dragor and Union came on for non-jury trial before the United States District Court in Tucson. Prior to the trial, Union, although denying any liability in the action, but realizing that Mosher was seeking to hold it liable for the obligation of Dragor, obtained leave to file a counterclaim against Mosher praying that (1) the court determine whether a principal-surety relationship existed between Ward and Union with respect to the Mosher claim, and (2) that in the event such relationship was found to exist, and Union and Ward were each held liable to Mosher, that Plaintiff be compelled first to seek satisfaction on its claim from Ward, as the defendant primarily responsible for payment. Dragor, although not a party to the counterclaim, unsuccessfully sought to dismiss the same on the ground that it constituted a breach of Union's covenant not to sue delivered pursuant to the settlement agreement.[4]

On April 30, 1964, seven months after executing the $1,000,000 note and settlement agreement, Dragor obtained permission from the Arizona Corporation Commission to surrender its license to transact business in Arizona "except as to creditors." (R.1, p. 25). On September 30, 1964, Dragor defaulted in payment of the $1,000,000 note indebtedness and has never paid one cent on its nine million dollar debt to Union on the subcontract or on the note given in settlement thereof. (R.1, p. 3).

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[4] On May 24, 1966, the court below entered judgment in favor of Mosher and against Dragor and Union in the amount of $268,882.92. On June 20, 1966, the Court below entered a further judgment that Union take nothing by its counterclaim. Both defendants have filed notice of appeal.

Institution of This Action.

As a result of the default, Union filed this action against Dragor Shipping Corporation on December 23, 1964. The complaint alleged that Dragor had defaulted in payment of the sum of $1,000,000 and interest under the promissory note and agreement settling claims between the parties which arose out of the construction work performed in the State of Arizona (R.1, p. 2). Service of process was made upon Dragor by delivering copies of the summons and complaint both to Dragor's registered agent, C. T. Corporation, and to the Arizona Corporation Commission (R.1, pp. 12-14).

On January 12, 1965, Dragor appeared specially and filed a motion to quash service of process and dismiss the complaint on the ground that the District Court had not obtained jurisdiction over its person through the service of the process employed (R.1, p. 15). The motion to quash and dismiss was denied by the trial court on February 2, 1965 (R.1, p. 182). Judge Walsh then refused to certify his order for interlocutory review (R.1, p. 182), and Dragor unsuccessfully sought leave of this court to file a petition for writs of prohibition and mandamus (C.A. No. 19932).

Dragor's Answer and Counterclaim.

Dragor thereupon filed its answer to the complaint on March 22, 1965. The answer did not deny default and non-payment of $1,000,000 note indebtedness to Union, but reasserted the jurisdictional objection as an affirmative defense, stating that the court below was without "power or authority to determine or adjudicate the claims asserted by the plaintiff herein against this defendant." (R.1, p. 97). Dragor then pleaded the instant counterclaim, which it claims was

"a compulsory counterclaim under the Federal Rules of Civil Procedure." (R.1, p. 105).

The counterclaim alleged that Union had improperly prosecuted its claims (including those assigned by the joint venture) for equitable adjustment against the United States Government, in which claims Dragor alleged it had a contingent financial interest under the terms of the settlement agreement.[5] It also alleged that Union had breached the covenant not to sue given Dragor pursuant to the settlement agreement by filing the above-described counterclaim against Mosher, and by engaging in acts adverse to Dragor's interest in the Mosher Steel Company litigation.[6] In its prayer for relief Dragor demanded (R.1, p. 105):

> "An affirmative judgment against the plaintiff for the sum of not less than $1,000,000, together with appropriate interest thereon and such additional damages as may be ascertained and

[5] Dragor alleged that Union had breached the agreement: "(a) By changing and altering the defendant's claims without the knowledge or consent of the defendant . . . (b) By failing to promptly, efficiently, competently and expeditiously file and prosecute the plaintiff's claims . . . (c) By failing to efficiently, competently and diligently assemble, collate and submit the evidence necessary to support such claims . . . (d) By failing to competently, efficiently and diligently press for redetermination, reviews and appeals . . . (e) By failing to diligently, efficiently and competently assemble, collate and submit the evidence necessary to support applications for such redeterminations, reviews and appeals . . . (f) By failing to exercise the degree of care, skill, diligence and competence necessary for the collection of the moneys due upon such claims . . . (g) By failing and refusing to advise the defendant of the manner in which it had filed and prosecuted said claims . . . (h) By failing and refusing to account to the defendant for the moneys, if any, collected . . ." (R.1, p. 101).

[6] In this regard the counterclaim alleged: "16. That, in breach and violation of the aforesaid 'Covenant Not To Sue,' and subsequent to the execution and delivery thereof, the plaintiff herein, by its acts in the aforesaid action, including the filing of amended pleadings and a counterclaim against the plaintiff, Mosher Steel Company, as well as by its memorandum of facts and law, continuously and persistently pursued this defendant by alleging, asserting and arguing that this defendant was liable to the said Mosher Steel Company for the full amount of its claim and continuously and persistently sought to have the Court impose upon this defendant a liability to the said Mosher Steel Company for the said amount; and that the acts so committed and performed by this plaintiff, in violation of the obligations set forth and contained in the aforesaid 'Covenant Not To Sue,' constituted a further breach of the said settlement agreement." (R.1, p. 103).

determined during the course of this action, including the costs and disbursements thereof."[7]

Dragor's Use of Counterclaim in Effort to Prevent Judgment on the Pleadings.

On April 7, 1965, Union filed a motion for judgment on the pleadings on the ground that defendant's answer failed to state a defense to Union's claim for relief (R.1, p. 110). Dragor's answer had failed to deny execution of the settlement agreement and promissory note, the consideration therefor, the amount of its note indebtedness, the maturity date, or its failure to pay. Plaintiff contended that under these circumstances, Union was entitled to judgment on its claim for relief, and also requested that, in the event the court found merit in its motion, that consideration be given to certification of any judgment pursuant to F.R.C.P. Rule 54(b) (R.1, pp. 110, 114, 137).

Dragor opposed this motion by contending that it was entitled to a determination of its counterclaim before any judgment could be entered with respect to plaintiff's claims for relief. Dragor stated in its memorandum (R.1, p. 148):

> "The courts have repeatedly ruled that neither a motion for judgment on the pleadings nor a motion for summary judgment will lie where a defendant has set forth a valid and subsisting counterclaim in its answer which equals, or exceeds, the amount of the plaintiff's claim."

The court below rejected this contention. On June 1, 1965, Judge Walsh granted plaintiff's motion and

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[7] Note that by reason of the settlement agreement formula, (R.1, p. 100) Dragor would have been required to prove that Union, but for its conduct, would have received fully $13,000,000 in claims payments in order to entitle Dragor to $1,000,000. The incredible character of Dragor's counterclaim is apparent from the fact that Union would have had to deliberately destroy 90% of its claims in order to deprive Dragor of its 10% share.

ordered entry of a judgment in favor of Union for $1,037,500. (R.1, p. 151).

Dragor's Opposition to Rule 54(b) Certification.

The court below, upon granting judgment on the pleadings, certified the judgment as final, pursuant to the provisions of F.R.C.P. Rule 54(b). Dragor thereby was afforded the immediate appeal on its service of process objection which it had previously sought prior to filing its counterclaim. Nevertheless, Dragor contested and opposed certification.

Even after Rule 54(b) certification had been granted, Dragor persisted in its objection. It contended that certification was error because defendant had not yet been afforded a trial on the merits, and an opportunity to secure an affirmative judgment against plaintiff on its counterclaim even though Dragor now says the counterclaim was in the case only under "compulsion" of the rules and was *void ab initio*. In its statement of points on appeal from the June 1 Judgment, Dragor asserted (R.1, p. 170):

> "VIII
>
> The United States District Court for the District of Arizona erred in making and entering said final judgment of June 1, 1965, after denying the plaintiff's motion to dismiss the defendant's Set-Off and Counterclaim, because said judgment was made and entered prior to a trial of the merits of the action. . ."

Dragor's Motion to Stay Enforcement of June 1, 1965 Judgment.

Dragor next filed a motion on June 10, 1965, pursuant to F.R.C.P. Rule 62(h), to stay enforcement of the June 1 judgment. As grounds for the motion Dragor again urged that it possessed a counterclaim which the Court had ruled stated a valid and subsist-

ing claim for relief, (R.1, pp. 58-9). Under these circumstances, Dragor asserted that it was entitled to have stayed "enforcement of said judgment for plaintiff against defendant *until the entering of a subsequent judgment on defendant's setoff and counterclaim.*" (R.1, p. 161.) (Emphasis added.)

Judge Walsh, following briefing and oral argument, denied the motion for a stay of enforcement on June 28, 1965. One week later, on plaintiff's motion, he set the counterclaim for trial on December 7, 1965 (R.1, pp. 152, 184). Not content with this disposition, Dragor contended that Judge Walsh had abused his discretion and erred in not staying execution of the judgment on the note until after Dragor could secure an adjudication of its counterclaim. In its statement of points on appeal filed in this Court, Dragor declared (R.1, p. 193):

> "The United States District Court for the District of Arizona abused its discretion and erred in overruling and denying defendant's motion filed on June 10, 1965, under Rule 62(h), Federal Rules of Civil Procedure, to stay enforcement of said final judgment of June 1, 1965, and in making and entering its order of June 28, 1965, which overruled and denied same, in that, as more particularly appears on the face of said motion and defendant's memorandum of points and authorities attached thereto, said Court by its order, made and entered on June 1, 1965, acknowledged, upheld, and ruled that defendant's Set-Off and Counterclaim is legally sufficient, and left the issues raised therein and by plaintiff's reply thereto for future determination and subsequent judgment herein, and no reason or just cause appeared, or appears why defendant's said motion should not be granted and allowed."

In repeatedly demanding and insisting upon a trial of the counterclaim by the court below, Dragor

never asserted, contended, or even implied that Judge Walsh was without jurisdiction to entertain the counterclaim or to grant the relief which Dragor sought against Union under that pleading. Actually it affirmatively sought the aid of the very court it now says had no jurisdiction and even obtained a ruling by the court below that the counterclaim was legally sufficient.

Dragor did attempt, in its counterclaim, to save its objection to the court's personal jurisdiction over Union's claim against it on the promissory note; but this is not to be confused with the jurisdiction of the court to hear and decide Dragor's claim *against* Union. It is apparent that Dragor could, at any time, have asserted this claim by an original action against Union in the United States Court for the District of Arizona, since all requisites of federal jurisdiction existed, the work was done in Arizona, and Union was doing business there. Union could have had no valid objection to either venue or jurisdiction, had it desired to assert such objection.

Dragor's Counterclaim Discovery.

Dragor not only demanded and insisted upon an opportunity for trial, but was also pursuing a vigorous discovery program on the issues raised by its counterclaim. On the same date, March 22, 1965, that plaintiff filed its answer and counterclaim, Dragor also filed a jury demand and a notice of taking the deposition of plaintiff by its secretary and manager of government contracts (R.1, p. 182). On April 1, it filed a motion for production of documents, filed a statement of points and authorities with respect thereto, and noticed the motion for hearing (R.1, p. 183). At the same time, it filed notices to take the depositions of Robert W. DeBolt, Union's consultant in charge of claims preparation, and of William B.

Browder, Union's general counsel (R.1, p. 183). These depositions were taken by Dragor's counsel and together with bulky exhibits were filed in the court below on May 26, 1965 (R.1, p. 183).

In addition to the hearing on the motion for the production of documents, a hearing was also held on Union's motion to modify the document demands made by Dragor pursuant to subpoena duces tecum (R.1, p. 183). At the hearing a procedure was established for document production, and Union thereafter produced for inspection and copying the hundreds of documents relating to the construction work on the Tucson Missile Launch project which gave rise to claims for an equitable adjustment, and the numerous and bulky documents with respect to the manner in which the claims were prepared and presented to the Contracting Officer and to the Board of Contract Appeals (R.1, p. 183).

Dragor's Motion to Discontinue Counterclaim Without Prejudice.

After this discovery, Dragor lost all interest in securing an adjudication of its claim for relief. Heretofore, Dragor had been demanding a prompt determination of its counterclaim; now, on October 25, 1965, after the DeBolt deposition had conclusively established that there was no merit in its claim (R.1, p. 184), Dragor filed a motion to dismiss the counterclaim without prejudice (R.2, p. 232) in order to withdraw the same from suit, and thereby to forestall an adjudication thereon.

When demanding an opportunity to try its counterclaim, Dragor had never assumed the position that the court was without jurisdiction to adjudicate and enter a binding judgment on its claim for relief *against* Union. As pointed out above, it had affirma-

tively sought the aid of the trial court, not under duress as it now alleges, but to obtain a million dollar judgment against Union.

Dragor, at the time of filing notice of appeal on June 29, 1965, had refused to post any supersedeas bond to stay enforcement of the June 1 judgment. Union, therefore, was required to institute supplemental proceedings pursuant to F.R.C.P. Rule 69, and an action in the Connecticut District Court against Jakob Isbrandtsen, a Connecticut resident, on his guaranty of Dragor's note indebtedness (R.2, p. 199).

Isbrandtsen, on July 27, 1965, filed an answer to Union's complaint and, at the same time, filed a third party complaint against Dragor ostensibly seeking reimbursement for any amount he might be required to pay Union under his guaranty (R.2, p. 199). Isbrandtsen, individually and through his affiliated companies, owned or controlled about 69% of Dragor's total outstanding voting stock (R.2, p. 200). Dragor, not surprisingly, did not resist being joined as a party to the guaranty action and voluntarily entered its appearance.

Dragor next employed its status as a third party defendant as a means of introducing the Arizona counterclaim into the Connecticut proceedings as a permissive third party claim against Union under F.R.C.P. Rule 14 (R.2, p. 200). After Dragor's Arizona counterclaim was thus injected into the Connecticut proceeding, Isbrandtsen, on October 15, 1965, filed a motion in the Connecticut action seeking to restrain Dragor and Union from proceeding with the trial of the counterclaim pending in the Arizona District Court (R.2, p. 200). However, the District Judge in Connecticut, the Honorable Robert C. Zampano, after hearing arguments, *sua sponte* stayed all pro-

ceedings in the Connecticut action until final disposition of the Arizona controversy.[8]

Only after the Connecticut Court made clear its intention not to enjoin prosecution of the Arizona counterclaim did Dragor, on October 25, seek voluntary dismissal of its counterclaim in the United States District Court in Tucson.

Defendant urged that it should be permitted to discontinue what it described as a "compulsory counterclaim" in order to continue the same as a *permissive* third party claim in Union's action against Isbrandtsen in the United States District Court for the District of Connecticut, sitting at New Haven. *Union Tank Car Company* v. *Jakob Isbrandtsen,* Civ. No. 11011.

Union, in opposition to Dragor's motion, urged that as a straightforward matter of the exercise of judicial discretion, Dragor had advanced no legitimate reason for discontinuing the Arizona counterclaim in order to burden the Connecticut Federal Court with the same litigation.

Union pointed out to the trial court the completion of discovery with respect to the merits of the counterclaim, the pending trial date, the Court's

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[8] This order does not appear of record in this proceeding, but Dragor conceded the same in its brief at p. 18, Footnote 9. Judge Zampano's order read in pertinent part: "All proceedings in this Court shall be and they hereby are stayed pending final disposition of the litigation presently pending in the United States District Court for the District of Arizona under the caption *Union Tank Car Company* vs. *Dragor Shipping Corporation* No. CIV 1967-Tuc., together with the two appeals presently pending in the Court of Appeals for the 9th Circuit which arise out of such case, and together with any other appeals which may be taken in such case, including any other appeals taken to the Court of Appeals for the 9th Circuit, and/or any proceedings including appeals and/or a petition or petitions for a writ of certiorari to the United States Supreme Court, . . .".

After Dragor effected its entrance into the Connecticut action Union also noticed an injunction motion before Judge Walsh, anticipating that Dragor and Isbrandtsen would seek to shift the scene of the Arizona counterclaim controversy to Connecticut. However, as Dragor's counsel concedes in its brief at p. 18, Footnote 9, Union never pursued this motion before the court below.

unique knowledge of Davis-Monthan Missile Launch construction problems, its unique knowledge of the Mosher Steel Company litigation, and the inevitable delay inherent in any renewal of the counterclaim controversy in an East Coast forum, all weighed conclusively in favor of retaining jurisdiction for the December 7 trial.[9]

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[9] Union, through counteraffidavit in opposition to Dragor's, stated:

"Since this Court heretofore set the compulsory counterclaim down for trial on December 7, 1965, both DRAGOR and UNION have expended substantial time and money in preparation for the trial of said claim. Extensive discovery, including the taking of depositions and the production of documents, has already been completed. UNION has been in the process of obtaining witnesses who it will bring on for trial, and the majority of said witnesses reside in the southwestern portion of the United States. The subject matter of the compulsory counterclaim further concerns, in one way or another, the manner in which work was done and conducted on the Titan II Missile Launch Facilities at the Davis-Monthan Air Force Base. This subject matter has been before this Court in one or another form for the past three years and no other court in the United States has the background, knowledge or experience with which to proceed to trial on the issues in said counterclaim.

"27. Said compulsory counterclaim further alleges that UNION breached the covenant not to sue given in conjunction with the October 3, 1963 settlement agreement by virtue of filing a counterclaim against Mosher Steel Company in the so-called *MOSHER STEEL COMPANY* litigation heretofore referred to. All matters and things pertaining to the *MOSHER STEEL COMPANY* litigation have been personally conducted before this Court and the effect of the covenant not to sue and the proceedings in the *MOSHER* case and any possible breach of covenant are all matters and things with respect to which this Court has unique knowledge.

"28. All of the assertions contained in the compulsory counterclaim pending before this Court alleges breaches of fiduciary duty in the prosecution of claims against the United States Government are in fact false and the discovery already taken in this proceeding establishes that such changes as were made by UNION in the assigned IMI-WARD joint venture claims were made because the claims as prepared and assigned by DRAGOR could not be substantiated or supported by records of the IMI-WARD joint venture and if filed in their original form would have subjected UNION and other persons working on said claims to possible prosecution under the False Claims Act of the United States.

"29. UNION is prepared and anxious to proceed with trial of DRAGOR'S compulsory counterclaim before this Court on December 7, 1965 and to secure an opportunity to prove that all of the charges of breach of covenant and deliberate and negligent mishandling of claims are false and without basis in fact and wholly without merit. The instant motion for voluntary discontinuation of this action, if granted, would prevent any adjudication of said compulsory counterclaim for an indefinite period of time and would cause the same to pend in the Connecticut forum where duplicative discovery and proceedings would have to be undertaken which would be wholly unnecessary before this Court." (R.2, pp. 201-3).

The court below, after full consideration of the merits of the motion, and after considering the affidavits of the parties and the arguments of their counsel, entered an order on November 10, 1965, denying Dragor's motion for voluntary dismissal of the counterclaim (R.2, p. 232).

On December 7, counsel for Union appeared, ready for trial, before the court below. No appearance was made by Dragor. The Court thereupon stated for the record (R.2, p. 205):

> "Let the record show that there is no appearance on behalf of the defendant and counterclaimant Dragor. Some ten days ago Mr. Hull called on me in chambers and advised me that he had been instructed that when this case was reached on this date he was not to make an appearance, he was not to present anything on the counter-claim, that the matter would be permitted to go by default. In view of that, I have not called a jury for this morning. But the plaintiff and counter-defendant announcing ready and the defendant and counterclaimant not appearing, I assume pursuant to the announced intention of abandoning the case, it is ordered that the counterclaim is dismissed for lack of prosecution."

On the same date, judgment was entered by the Clerk of the court below, stating:

> "This action came on regularly for trial this day before the Court, Honorable James A. Walsh, United States District Judge, presiding, and the defendant and counter-claimant having failed to appear for trial and the plaintiff and counter-defendant having appeared by counsel and having announced ready for trial,
>
> "It is Ordered and Adjudged that the counterclaim herein is dismissed for failure of defendant and counterclaimant to prosecute the

same and that defendant and counterclaimant take nothing by virtue thereof." (R.2, p. 207.)

The only question thus presented on this appeal is whether, in view of the above facts, the court below abused sound judicial discretion in dismissing Dragor's counterclaim with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

ARGUMENT

POINT I

THE COURT BELOW HAD JURISDICTION OVER THE SUBJECT MATTER AND PARTIES TO DRAGOR'S COUNTERCLAIM. IN CONSEQUENCE, IT HAD JURISDICTION TO ENTER JUDGMENT DISMISSING THE COUNTERCLAIM FOR WANT OF PROSECUTION UPON DRAGOR'S DEFAULT.

Dragor, in its opening brief, would create the impression that determination of the pending appeal is controlled on principles of *res judicata* by the prior decision of this Court with regard to the validity of the June 1, 1965 judgment. That decision determined only that the court below was without jurisdiction to enter a judgment against the defendant on the claims for relief alleged in plaintiff's complaint. The determination was made solely on the basis of the sufficiency of service of process. No question concerning the counterclaim, by which Dragor sought relief in the Court below, was raised or decided or presented on that record.

On the present appeal a completely separate and distinct question is presented which was not in any way determined by the prior adjudication of this Court. That question is whether the jurisdiction over the counterclaim of the court below was ancillary to plaintiff's suit on the note or was based on independent jurisdiction to entertain defendant's counterclaim praying for "a judgment against the plaintiff for a sum of not less than $1,000,000" *without regard to the court's authority to entertain a claim for relief against Dragor on Union's complaint.*

When distinct questions are so placed in issue in different appeals on separate claims, principles of *res*

judicata are inapplicable. *Cromwell* v. *Sac County,* 94 U.S. 351, 356, 24 L. Ed. 195, 199 (1877):

> "It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

Because a question on this appeal is presented which is separate and distinct from that raised on prior review, this Court unquestionably has power to determine the present counterclaim jurisdiction dispute unfettered by any *res judicata* considerations. The question presented here has not yet been adjudicated.

A. A Party Seeking Affirmative Relief Thereby Submits Himself to the Court's Jurisdiction.

Consideration of the counterclaim jurisdiction question properly begins with the landmark decision in this field of law, which is *Merchants Heat & Light Company* v. *James B. Clow & Sons,* 27 S. Ct. 285, 204 U.S. 286, 51 L. Ed. 488 (1907).

Merchants, an Indiana corporation, was sued in an Illinois Federal Court through service of process on an alleged agent of the company. After its motion to quash the return of service was made and overruled, Merchants filed an answer pleading the general issue and also alleging a counterclaim for damages for breach of the same contract sued upon by plaintiff.

On appeal from a judgment for the plaintiff, Merchants again sought to raise the service of process question. This the Supreme Court refused to decide, holding that by voluntarily seeking affirmative relief through counterclaim, Merchants had submitted to the jurisdiction of the court. The Supreme Court, in an opinion by Mr. Justice Holmes, declared:

> "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. *Harkness* v. *Hyde,* 98 U.S. 476, 25 L. Ed. 237; *Southern P. Co.* v. *Denton,* 146 U.S. 202, 36 L. Ed. 943, 13 Sup. Ct. Rep. 44. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it."

This conclusion was reached notwithstanding that the counterclaim arose, as it was said, "out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than set-off proper." Mr. Justice Holmes further said:

> "There is some difference in the decisions as to when the defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits." The Supreme Court has never lost sight of the

Merchants principle, invoking the same to sustain jurisdiction over a defendant who had filed a cross-complaint against a third party (*Texas & P.R. Co.* v. *Eastin,* 29 S. Ct. 564, 214 U.S. 153, 53 L. Ed. 946 (1909)); to find a jury trial waiver by a defendant who filed a legal counterclaim to a bill in equity (*American Mills Co. v. American Surety Co.,* 43 S. Ct. 149, 260 U.S. 360, 67 L. Ed. 306 (1922)), and to find a waiver of an otherwise valid venue objection to an antitrust claim for relief (*Freeman* v. *Bee Ma-*

chine Co., 63 S. Ct. 832, 319 U.S. 448, 87 L. Ed. 1509 (1943)).

Today, in consequence of *Merchants,* the general principle is established that a litigant who in any significant way invokes the jurisdiction of the federal court for the purpose of securing affirmative relief, thereby submits to the court's jurisdiction over the person. *North Branch Products, Inc.* v. *Fisher,* 284 F. 2d 611 (C.A. D.C., 1960); *Kincade* v. *Jeffery-DeWitt Insulator Corp.,* 242 F. 2d 328 (C.A.5, 1957); *Hadden* v. *Rumsey Products,* 196 F. 2d 92 (C.A.2, 1952); *Noerr Motor Freight* v. *Eastern R.R. Presidents Conference,* 155 F. Supp. 768, 838 (D.C. E.D. Pa., 1957); *Hook & Ackerman, Inc.* v. *Hirsch,* 98 F. Supp. 477 (D.C. D.C., 1951).

B. The "Compulsory" Counterclaim Issue.

Merchants is determinative of the prior appeal from the June 1 judgment but for the claim now made that Dragor's counterclaim was compulsory. *Merchants* held that a defendant by voluntarily filing a counterclaim waived any personal jurisdiction defense to plaintiff's claim for relief. That Dragor's action in filing a counterclaim was voluntary is shown by the fact that it vigorously prosecuted it until it took DeBolt's deposition. It was only when it found it could not prevail that it sought voluntary dismissal. In 1A *Barron & Holtzoff, Federal Practice and Procedure,* § 370.2, p. 535, it is stated:

> "Other decisions have held that the assertion of a counterclaim is a waiver today just as it would have been prior to the rules. The language of Rule 12(b), when carefully analyzed, does not seem to the contrary. The rule says, in relevant part: 'Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall

> be asserted in the responsive pleading thereto * * *. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.' It seems reasonably clear that in this passage the word 'counterclaim' refers back to 'claim for relief in any pleading,' rather than to 'defense,' and that a counterclaim is not a 'defense or objection' which may be asserted along with other defenses or objections without waiving them, within the purview of the later sentence of Rule 12(b). This is not to say that assertion of a counterclaim is such a waiver. The rules are simply silent on the question. A good argument could be made that finding a waiver in such circumstances is contrary to the general philosophy of the rules, but such an argument should be addressed to those who recommend amendments to the rules. Since the rules are silent the former doctrine, that there is such a waiver, must be held to have continued vitality."

To the same effect, see *Beaunit Mills, Inc.* v. *Industrias Reunidas F. Matarazzo,* 23 F.R.D. 654, 656 (S.D. N.Y., 1959).

Despite the absence of any express provision in the Federal Rules on this question, the Tenth Circuit has held that the filing of a compulsory counterclaim does not constitute a waiver of a personal jurisdiction defense *to a plaintiff's claim for relief. Hasse* v. *American Photograph Corporation,* 299 F. 2d 666 (C.A.10, 1962).

No suggestion, however, is contained in *Hasse,* or any other precedent, that preservation of a defendant's personal jurisdiction defense to a plaintiff's claim for relief compels the further conclusion that a court is without jurisdiction to entertain and dispose of a counterclaim where the Court has subject matter jurisdiction.

Davis v. *Ensign-Bickford Co.,* 139 F. 2d 624 (C.A.8, 1944); *Blank* v. *Bitker,* 135 F. 2d 962 (C.A.7, 1943); and *Sadler* v. *Penn. Refining Co.,* 33 F. Supp. 414 (W.D., S.C., 1944), all cited by Dragor in its brief at p. 23-24, do not involve the compulsory counterclaim issue, and are not in point.

On the contrary, so far as diligent research reveals, every United States Court of Appeals considering the question has held that a District Court, although found to be without jurisdiction to grant relief on plaintiff's complaint, may yet retain and adjudicate any counterclaim, compulsory or otherwise, provided such counterclaim is within the subject matter jurisdiction of the court.

C. Authorities Confirming Judge Walsh's Counterclaim Jurisdiction.

One of the first cases deciding this question was the Second Circuit's decision in *Vidal* v. *South American Securities Co.,* 276 Fed. 855 (C.A.2, 1922). Vidal, an alien, brought a suit in equity in the New York District Court against Bright, Securities Company, Railway Company, Construction Company, and others, to fix and determine plaintiff's rights to securities in accordance with the contract between one or more of the parties. Jurisdiction was invoked pursuant to the then Section 57 of the Judicial Code, which permitted service by publication in any suit to enforce a legal or equitable claim to personal property within the judicial district. The defendants unsuccessfully contested jurisdiction by motion, whereupon each of the defendants, except Bright, sought affirmative relief by counterclaim or cross-claim. The District Court, at the conclusion of the case, entered a decree granting plaintiff's prayer for relief, granting the prayers contained in the cross-complaints of

Railway Company and Construction Company, and dismissing Securities Company's counterclaim on the merits.

On appeal, the Second Circuit held that the securities in suit did not constitute personal property within the judicial district within the meaning of Section 57. Since Bright, an indispensable party, resided abroad and could in no event be served in any other manner, the District Court's decree was reversed and remanded, with directions to dismiss the proceedings below.

A petition for rehearing was thereupon filed, pointing out that irrespective of the court's jurisdiction to grant relief on the complaint, independent jurisdiction existed with respect to the claims of defendants seeking affirmative relief by cross-claim and counterclaim. The court granted rehearing, and thereupon filed a further opinion, declaring, at p. 874:

> "We dismissed the original bill in this case because the plaintiff had no lien upon or claim to the securities mentioned under section 57 of the Judicial Code, and also because the defendant Bright was not an inhabitant of the Southern district of New York or served therein. Following the general rule that a cross-bill falls with the original bill, we also dismissed the counterclaims which under equity rules 30 (201 Fed. v, 118 C.C.A. v) and 31 (198 Fed. xxvii, 115 C.C.A. xxvii), are substituted for cross bills. . . .
>
> "As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, except in the case of the defendant Bright [who sought no affirmative relief], they should not have been dismissed, but should have been treated as original bills upon the dismissal of the original bill."

The Second Circuit thereupon remanded the case, directing that affirmative relief on their counterclaims be given Railroad Company and Construction Company.

Another case to the same effect decided by this Court is that of *Pioche Mines Consol.* v. *Fidelity-Philadelphia Trust Co.,* 202 F. 2d 944 (C.A.9, 1952), further opinion 206 F. 2d 336 (C.A.9, 1953). There, Fidelity, by supplemental complaint, sought a decree to enforce an agreement settling prior litigation involving Consolidated's default in paying debenture obligations. Consolidated first attempted to dismiss the supplemental complaint for want of an indispensable party defendant who was not amenable to service of process. Consolidated also filed a $3,000,000 counterclaim alleging that Fidelity and others had conspired to prevent consummation of the settlement for the purpose of financially crippling Consolidated. Following a summary judgment hearing, the trial court granted plaintiff a decree and dismissed the counterclaim.

On appeal, this Court upheld Consolidated's indispensable party objection and reversed the court below, with directions to dismiss. Consolidated thereupon petitioned for rehearing on the ground that the District Court's inability to secure jurisdiction over the parties necessary to adjudicate the complaint, did not destroy its independent jurisdiction to adjudicate the counterclaim. Consolidated, in consequence, argued that it was entitled to have this Court determine whether the District Court's dismissal of the counterclaim on summary judgment was correct.

This Court, just as in *Vidal,* granted the petition for rehearing and ordered the judgment dismissing the counterclaim reversed, with leave to Consolidated

to amend. In its further opinion, the court declared (206 F. 2d, at p. 336):

> "We heretofore ordered the dismissal of the supplemental complaint of appellee Fidelity in this case for absence of indispensable parties. *Pioche Mines Consolidated* v. *Fidelity-Philadelphia Trust Co.,* 202 F. 2d 944. In ruling on the case we neglected the issue whether the trial court's dismissal of Pioche's counterclaim was proper. Pioche petitioned for a rehearing requesting that we pass on that matter. Fidelity was asked to present a brief expressing its views on the subject and has done so. To this Pioche has replied, and the neglected issue is now before us for disposition.
>
> "Fidelity argues that the dismissal of its complaint renders mandatory a dismissal of the counterclaim also. We think not. *Compulsory counterclaims are required to be dismissed only when the complaint is dismissed for want of jurisdiction, which was not the case here. The counterclaim persists where it is supported by an independent ground of federal jurisdiction, Isenberg* v. *Biddle,* 75 U.S. App. D.C. 100, 125 F. 2d 741; 3 *Moore's Federal Practice* § 13.15. Pioche is a resident of Nevada, Fidelity of Pennsylvania; and federal jurisdiction thus rests on diversity." (Emphasis added.)

In stating, "Compulsory counterclaims are required to be dismissed only when the complaint is dismissed for want of jurisdiction," this court was apparently referring to the fact that such counterclaims, unlike permissive counterclaims, are deemed ancillary to the main action and ordinarily *need* no independent jurisdiction grounds to support them. *New York Life Insurance Co.* v. *Kauffman,* 78 F. 2d 398 (C.A.9, 1935), cert. den. 296 U.S. 626, 80 L. Ed. 445 (1935); 3 *Moore's Federal Practice* (2d Ed.), ¶ 13.15 at p. 41. When a court has *only* ancillary jurisdiction of a compulsory counterclaim, that counter-

claim, of course, must be dismissed if jurisdiction over the complaint is lacking. But irrespective of jurisdiction over the complaint, a counterclaim persists, as this Court further stated, "when it is supported by independent grounds of federal jurisdiction."

The Seventh Circuit so construed this Court's *Pioche* opinion in *Switzer Bros., Inc.* v. *Chicago Cardboard Co.,* 252 F. 2d 407 (C.A.7, 1958). There, on appeal, plaintiff contended that by reason of a finding of the trial court that it had no jurisdiction to entertain a patent infringement complaint, the trial court necessarily lost jurisdiction to proceed with a counterclaim which stated a separate cause of action based upon the antitrust laws. The Seventh Circuit rejected this contention and, in addressing itself to the *Pioche* case, declared, at p. 410:

> "It is true that in the *Pioche* case the court held that dismissal of a complaint for want of jurisdiction also requires dismissal of a compulsory counterclaim. However, the court at the same time stated (206 F. 2d, at page 366):
>
> > " 'The counterclaim persists where it is supported by an independent ground of federal jurisdiction . . .' "

The Seventh Circuit went on to hold, at p. 410:

> "It appears to be settled that where a counterclaim states a cause of action seeking affirmative relief independent of that stated in the complaint, the dismissal of the complaint does not preclude a trial and determination of the issues presented by the counterclaim. *Lyon Mfg. Corp.* v. *Chicago Flexible Shaft Co.,* 7 Cir., 106 F. 2d 930, 933; *Haberman* v. *Equitable Life Assurance Society of the United States,* 5 Cir., 224 F. 2d 401, 409.
>
> "It is our conclusion that plaintiff's contention is not sound. It is true, of course, that a Court in an action for patent infringement is

> without jurisdiction to proceed in the matter in the absence of indispensable parties, which includes all of the owners of the patent. Independent *Wireless Telegraph Co.* v. *Radio Corp. of America,* 269 U.S. 459, 468, 46 S. Ct. 166, 70 L. Ed. 357. Thus, the Court was justified in dismissing the complaint and paragraph 18 of plaintiff's counterclaim for the lack of indispensable parties as plaintiffs. It does not follow, however, that the Court at the same time lost jurisdiction to entertain the counterclaims. It is not open to question but that the Court under Title 28 U.S. C.A. § 1338 acquired jurisdiction of the subject matter of the original action. The Court also acquired jurisdiction of the subject matter of Radiant's counterclaim by reason of Title 15 U.S.-C.A. § 15, which provides that suit may be brought for a violation of the antitrust laws 'in any district court of the United States in the district in which the defendant resides or is found.' "

Both this Court in *Pioche,* and the Seventh Circuit Court of Appeals in *Switzer,* cited in support of its conclusion the decision in *Isenberg* v. *Biddle,* 125 F. 2d 741 (C.A. D.C., 1941). Plaintiff there brought suit to recover the value of property allegedly seized while plaintiff was wrongfully accused of being an enemy alien. The United States denied the allegations and counterclaimed to recover back sums already paid the plaintiff. The District Court determined that the plaintiff had in fact been an enemy alien and, accordingly, dismissed the complaint for want of jurisdiction. At the same time, the court granted the Government a money judgment on its counterclaim.

On appeal, the court held that the failure of jurisdiction over the complaint did not bar an adjudication of the counterclaim. Chief Judge Grover, speaking for the court, stated, at p. 743:

> "As to the first, counsel insists that when the bill of complaint was dismissed, 'the keystone of

the District Court's jurisdiction fell and the counterclaim should have been dismissed with the bill.' *Moore* v. *New York Cotton Exch.,* 270 U.S. 593, 607-609, 46 S. Ct. 376, 70 L. Ed. 750, 45 A.L.R. 1370, and *Kelleam et al* v. *Maryland Casualty Co.,* 312 U.S. 377, 61 S. Ct. 595, 85 L. Ed. 899 are cited to sustain this position. In the last named case, Justice Douglas, speaking to the facts in that case, said that once the bill of complaint was dismissed no jurisdiction remained for any grant of relief under the cross petition. *But in that case there was no jurisdictional basis for the counterclaim independent of the main action.* In the *Moore* case the dismissal of the main bill was not for want of jurisdiction, and the court refused to dismiss the counterclaim. Though it is suggested by Professor Shulman that it is implicit in the case that, if a plaintiff's action is dismissed for want of jurisdiction, the counterclaim falls, he adds that this is so only if there is no independent jurisdictional basis for the counterclaim. 45 Yale L.J. 393, 413. Here there is such independent basis, and the rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint." (Emphasis supplied.)

Pioche, Switzer and *Isenberg* were also relied upon by Judge Maris in his opinion in *Sachs* v. *Sachs,* 265 F. 2d 31 (C.A.3, 1959). There, on an appeal from the District Court of the Virgin Islands, the Third Circuit held that a complaint for divorce had been properly dismissed because the complainant was found to be a resident of Massachusetts. At the same time it held that the court had independent jurisdiction to entertain the defendant's counterclaim seeking a judgment for arrearages in support money due under a prior Massachusetts decree. Judge Maris declared, at 265 F. 2d 33:

"The counterclaim was an independent claim against the plaintiff based upon the judgment

of the Massachusetts probate court. If supported by independent grounds of jurisdiction, the district court could entertain it regardless of that court's lack of jurisdiction over the complaint. *Isenberg* v. *Biddle,* 1941, 75 U.S. App. D.C. 100, 125 F. 2d 741, 743; *Pioche Mines Consol. Inc.* v. *Fidelity-Philadelphia Trust Co.,* 9 Cir. 1953, 206 F. 2d 336, certiorari denied 346 U.S. 899, 74 S. Ct. 225, 98 L. Ed. 400; *Haberman* v. *Equitable Life Assurance Society of the United States,* 5 Cir. 1955, 224 F. 2d 401, 409, certiorari denied 350 U.S. 948, 76 S. Ct. 322, 100 L. Ed. 826; *Switzer Brothers, Inc.* v. *Chicago Cardboard Co.,* 7 Cir. 1958, 252 F. 2d 407, 410; 3 *Moore's Federal Practice,* 2d Ed., § 13.15. For there is no question but that section 22 of the Revised Organic Act, 48 U.S.C.A. § 1612, gives the district court subject matter jurisdiction over actions brought to enforce judgments for support. Thus such actions, whether original or interposed by way of counterclaim, may be entertained so long as the court has jurisdiction over the defendant in person or over his property. (Citations.) And here the plaintiff, having submitted himself to the jurisdiction of the district court by filing his complaint and appearing therein, put it within the power of the court to render a personal judgment against him on the counterclaim. *Adam* v. *Saenger,* 1938, 303 U.S. 59, 58 S. Ct. 454, 82 L. Ed. 649. We conclude that the district court did not err in entertaining the defendant's counterclaim and granting the defendant judgment thereon."

For identical District Court precedent in this Circuit see *Elliott* v. *Federal Home Loan Bank Board,* 233 F. Supp. 578 (S.D. Cal. 1964) (opinion by Hall, D.J.); *Pierce* v. *Perlites Aggregates,* 110 F. Supp. 684 (N.D. Cal., 1952) (opinion by Lemmon, D.J.). Compare *In Re Snow Camp Logging Company,* 168 F. Supp. 420 (N.D. Cal., 1958) (opinion by Halbert, D.J.).

The Rules of Civil Procedure, in express terms,

demonstrate that the counterclaim is independent of plaintiff's suit on the promissory note.

Thus, Rule 13(i) provides:

> "SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) *when the court has jurisdiction so to do,* even if the claims of the opposing party have been dismissed or otherwise disposed of." (Emphasis added.)

D. Defendant's Authorities Further Confirm Judge Walsh's Jurisdiction.

Doubtless this Court will have noticed that none of the foregoing authorities, despite their evident pertinency, were considered in Dragor's brief. The only comparable precedents mentioned by Dragor are *Haberman* v. *Equitable Life Assurance Society* of the *United States,* 224 F. 2d 401 (C.A. 5, 1955) (Dragor Brief p. 17, Footnote 7), and *Manufacturers Cas. Ins. Co.* v. *Arapahoe Drilling Co.,* 267 F. 2d 5 (C.A.10, 1959) (Dragor's Brief p. 27).[10]

In the *Haberman* case, Equitable brought suit for a declaratory judgment determining its liability, if any, under an annuity policy. Defendant Haberman, as executor, answered and also counterclaimed for amounts allegedly due under the same policy. Following trial, the District Court granted the requested declaratory judgment relief, and also found that defendant was entitled to no further amounts under the policy.

On appeal, the Fifth Circuit *sua sponte* raised the issue whether defendant could avoid the adverse

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[10] *Kelleam* vs. *Maryland Casualty Company of Baltimore,* 312 U.S. 377 (85L Ed. 899, 1941) (cited in Dragor's Brief pp. 26-7) is considered and distinguished in the quoted passage of Judge Grover's opinion in *Isenberg,* supra., p. 30).

adjudication on the ground that Equitable did not have capacity to sue. Under the Texas statute, Equitable, as a condition to doing business, was required and had failed to designate a Texas resident for receiving service of process. The pertinent Texas statutory provision declared that a corporation failing to comply with the statute was barred from prosecuting suits in the Texas courts.

The court concluded, however, that any incapacity to prosecute a declaratory judgment claim did not extend to defending a counterclaim. Inasmuch as the court had independent jurisdiction of the counterclaim, the judgment adjudicating the merits was affirmed, Judge Tuttle stating (p. 409):

> "Although he has not thus far raised the issue, appellant may object that, granted our assumption that Art. 2031a applies to a foreign insurance company, the court has no jurisdiction of the action because § 5(b) of that Article incapacitates Equitable from bringing any action. However, this objection has no merit even under the assumption made. Such a statute disabling a foreign corporation from bringing an action does not disable it from defending an action, *Home Forum Ben. Order v. Jones,* 20 Tex. Civ. App. 68, 48 S.W. 219; 23 Am. Jur. 'Foreign Corporations' § 335; Annotation, 17 L.R.A., N.S., 1117; consequently Equitable could defend the counter claim in the present action. That counterclaim was a compulsory counterclaim under Rule 13(a), Federal Rules of Civil Procedure, and even if the complaint be dismissed, a compulsory counterclaim is not required to be dismissed where it is supported by a proper ground of federal jurisdiction. *Pioche Mines Consol., Inc.* v. *Fidelity-Philadelphia Trust Co.,* 9 Cir., 206 F. 2d 336, certiorari denied 346 U.S. 899, 74 S. Ct. 225, 98 L. Ed. 400; *Isenberg v. Biddle,* 75 U.S. App. D.C. 100, 125 F. 2d 741; 3 *Moore's Federal Practice* § 13.15. Here, federal jurisdiction of the counter-

> claim is present because there was diversity of citizenship and the requisite amount in controversy. Consequently, whether or not Equitable had the capacity to bring this action, this court has and the court below had, jurisdiction, Haberman having allowed the action and counterclaim to go to final judgment on the merits."

Haberman, like the authorities heretofore considered, confirms the conclusion that the court below retained independent jurisdiction to adjudicate Dragor's counterclaim. Dragor, nevertheless purports to distinguish its counterclaim situation on the ground that unlike *Haberman,* Dragor defaulted and did not allow the "counterclaim to go to final judgment on the merits" by participating in a trial of its claim. (Dragor Brief p. 17, Footnote 7.)

This attempted distinction of *Haberman* is without substance because the precedents already considered demonstrate that authority to adjudicate an independent counterclaim does not depend upon whether at the time of appeal the same has been disposed of by trial or default, or simply remains pending for further proceedings. In *Switzer,* for example, the District Court had entered a Rule 54(b) judgment dismissing the patent infringement complaint but retaining the antitrust counterclaim for a separate and future trial—a situation comparable to that presented by Dragor's present appeal. In holding that the District Court retained independent jurisdiction of the counterclaim, the Seventh Circuit patently concluded that such jurisdiction did not depend upon whether or not the counterclaim was still pending.

Arapahoe, the second precedent discussed by Dragor, is described as involving a "set of facts substantially resembling those of the instant case." (Dragor's Brief p. 27.) The facts actually were that Manufacturers had entered the case as an intervenor

plaintiff by reason of subrogation rights arising through payment of compensation to the original plaintiff, Campbell. Defendant Arapahoe counterclaimed against Manufacturers, contending that the former was an additional insured under a policy issued by Arapahoe to plaintiff's employer. Arapahoe's counterclaim sought judgment over against Manufacturers in the event Arapahoe was held liable to Campbell.

It was then discovered that no diversity of citizenship existed between Campbell and Arapahoe. The District Court thereupon dismissed the main case and vacated an order previously entered adjudicating the counterclaim issues against Arapahoe.

On appeal, the Tenth Circuit reviewed the authorities considered in this brief, declaring, at p. 7:

> "And indeed it seems well settled that where a jurisdictional basis exists for a counterclaim it may sometimes be considered, though the complaint fail for want of jurisdiction."

In order for such a counterclaim to remain for consideration, Judge Lewis went on to declare that three conditions must exist, namely:

> "Jurisdiction must exist within the scope of the allegations of the counterclaim; the claim made in the counterclaim must be independent of that made in the main case; and, lastly, affirmative relief must be sought."

Judge Lewis concluded that the second condition, independent status, did not exist because Arapahoe's counterclaim asserted a claim over *only in the event the counterclaimant were held liable to the plaintiff.* Dismissal of the plaintiff's complaint made the counterclaim meaningless. Judge Lewis stated:

> "So completely was the specific counterclaim related in practical effect to the outcome

of plaintiff Campbell's cause of action *that it became meaningless upon dismissal of the complaint.*" (Emphasis added.)

It should be noted that under Judge Lewis' test, Dragor's counterclaim clearly meets the three prescribed conditions. Condition 1, subject matter jurisdiction, exists by virtue of diversity of citizenship and jurisdictional amount; condition 2, independent status, exists because Dragor's breach of contract allegations with respect to prosecution of claims for equitable adjustment, and with respect to the Mosher litigation, constitute causes of action irrespective of Union's $1,000,000 note indebtedness claim; condition 3, affirmative relief, exists because Dragor seeks "an affirmative judgment for not less than $1,000,000" which is allegedly due irrespective of the merits of Union's claim.

We submit that the foregoing authorities here reviewed should dispel any doubts this Court might have concerning Judge Walsh's jurisdiction to entertain Dragor's counterclaim. That jurisdiction, we respectfully submit, is unimpeachable.

POINT II

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT LEAVE TO DRAGOR TO DISCONTINUE ITS COUNTERCLAIM WITHOUT PREJUDICE.

Dragor's second specification of error is that the District Court erred in denying Dragor's motion for leave to discontinue its counterclaim without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. This specification is without merit.

A. Whether Voluntary Dismissal Will Be Granted Is a Matter of Sound Judicial Discretion.

Rule 41(a)(2) of the Federal Rules of Civil Procedure states in pertinent part:

> "(2) *By Order Of Court.* Except as provided in paragraph (1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

The language of the above Rule by its terms establishes that Dragor was not entitled to voluntary dismissal as a matter of right. Rather, the District Court was called upon to exercise its sound judicial discretion and judgment in order to determine whether dismissal was in the interests of justice under the facts of this case. As Judge Carswell stated, in *American Cyanamid Co.* v. *McGhee,* 317 F. 2d 295, 298 (C.A.5, 1963):

> "[Under Rule 41(a)(2) the District] Court has an express judicial function to perform. All of the concepts and process of judicial determination are brought into play. The merits of each motion must be considered and a ruling made by the court. There is no language under this sec-

> tion which pre-ordains the ultimate judicial decision on a motion made under its terms . . . Rather than restricting a judicial function, as is done under 41(a)(1), dismissals by the court on motion under 41(a)(2) plainly puts upon the court a definite duty to perform: to grant or deny the motion, and to establish 'such terms and conditions as the court deems proper.' "

This Circuit has similarly concluded that voluntary dismissal under Rule 41(a)(2) is not a matter of right, but involves exercise of judicial discretion. In *Blue Mountain Construction Company* v. *Werner,* 270 F. 2d 305 (C.A.9, 1959), this Court was called upon to pass upon the propriety of Judge Solomon's denial of a motion to dismiss where the complaining party was "squarely representing to the trial court that their purpose in requesting a dismissal in the Oregon District was to enable them to institute an action in the Eastern District of Washington." In upholding the denial of the motion to dismiss, this Court clearly recognized the discretionary character of the District Court's judicial function in ruling upon such a motion. Judge Orr, speaking for the Court, stated at page 306:

> "Whether or not a dismissal will be granted is within the sound judicial discretion of the Court. *Ockert* v. *Union Barge Line Corp.,* 3 Cir., 1951, 190 F. 2d 303; *Rollison* v. *Washington National Ins. Co.,* 4 Cir., 1949, 176 F. 2d 364. We think it follows that each case must be determined on its own particular facts. We find no abuse of discretion in the denial of this motion."

This Court, in *Blue Mountain,* declared further that a party who refused to proceed with his claim upon denial of a Rule 41(b)(2) motion did so at his own risk. If no abuse of discretion existed in denying the motion, the party thereafter could not refuse to proceed and yet complain of a subsequent dismissal

with prejudice for want of prosecution. Judge Orr stated, at p. 307:

> "After the denial of their motion to dismiss, appellant informed the court that they refused to proceed further. Appellant took this position at its peril. If the trial court was in error in refusing to dismiss without prejudice, appellant was on safe ground, but on the other hand, as we find there was no abuse of discretion, then the subsequent action of the court in dismissing the action with prejudice for want of prosecution was proper.
>
> "The trial court set the case for pre-trial conference on July 21, 1958. The matter came on for pre-trial conference on said date. No appearance was made for or on behalf of appellant. In view of the information given the court that appellant would not proceed further, it justifiably concluded that there was a failure to prosecute and dismissed the action with prejudice under Rule 17 of the Oregon District Court and Rule (41(b) F.R. Civ. P.

Indeed, Judge Fee believed Blue Mountain's positive defiance of the trial court in refusing, after denial of its voluntary dismissal motion, to again appear before the trial court or to participate in a scheduled pre-trial conference of itself constituted grounds for dismissal with prejudice. Judge Fee, in his concurring opinion, stated at p. 308:

> "Irrespective of the question of abuse of discretion, the trial court had a right to dismiss the cause under this Rule because of the positive defiance of the order of the court setting the case for pre-trial conference . . .
>
> "The judgment of dismissal should be affirmed."

Blue Mountain, for the very considerations suggested by Judge Orr and Judge Fee, clearly establishes the propriety of Judge Walsh's action in this case.

B. Denial of Dragor's Motion to Discontinue Constituted No Abuse of Discretion.

The record facts, we believe, establish conclusively that Judge Walsh's action in denying Dragor's motion, not only did not constitute an abuse of his discretionary authority but such ruling was the only result consistent with considerations of justice and fair play. As we have pointed out, Dragor's counterclaim in this action has from the beginning constituted Dragor's only ostensible ground or excuse for refusing to pay the $1,000,000 note indebtedness which was undeniably due on September 30, 1964. For six months in the proceedings below Dragor consistently demanded an opportunity to try its counterclaim. On that ground, it opposed Union's motion for judgment on the pleadings and request for Rule 54(b) certification; it sought a stay of enforcement of Union's judgment, and pressed discovery for the sake of an early trial. Only after discovery was completed, and Dragor had an opportunity to explore the lack of merit in its unfounded assertions did it seek to postpone and avoid an adjudication. Only at this point did Dragor belatedly raise an objection to the court's jurisdiction over the counterclaim.

Union, convinced that the counterclaim allegations were false and meritless, welcomed Dragor's demand for an early trial date. The pendency of the counterclaim as an excuse for non-payment of Dragor's note indebtedness, and the complications it created in negotiations with the United States Government on claims for equitable adjustment made an early adjudication of the counterclaim of paramount importance to Union. On the other hand, the value of the counterclaim to Dragor, as an excuse for non-payment, necessarily depended upon postponing its adjudication as long as possible in order to deny the

plaintiff an opportunity of proving the same to be totally without merit.

Recognizing these considerations, Dragor, on October 25, 1965, six weeks before the December 7 trial date set on the preceding July 7, sought to avoid the trial by a discontinuance. Dragor pretended that it wanted Judge Zampano, in Connecticut, to assume the burden of trying out the host of complex issues concerning the performance of construction work on the 18 Titan II Missile bases at Tucson, the manner in which construction problems gave rise to claims for equitable adjustment, and the way in which these claims were presented to Col. Hoover, the government Contracting Officer in Tucson, and to the Board of Contract Appeals.

Dragor further alleged that it wanted Judge Zampano to review the proceedings in the *Mosher* case tried by Judge Walsh (and now on appeal to this Court), in order to determine whether Union's conduct in that proceeding constituted a violation of any of the terms of the October 3, 1963 settlement agreement. In other words, Judge Zampano was being asked to review a matter of which Judge Walsh had personal knowledge. It is no wonder, then, that Judge Zampano did not want to entertain such proceedings in his Court and finally stayed all proceedings in Connecticut in order to permit a full and complete disposition of the controversy in the Arizona forum.

Despite Judge Zampano's obvious willingness to have the entire counterclaim controversy disposed of in Arizona, Dragor nevertheless argued that it should be permitted to prosecute its counterclaim in Connecticut because Isbrandtsen was a party to that action and had entered no appearance in the Arizona proceedings. Dragor neglects to mention, however, that Isbrandtsen's presence in Connecticut was irrelevant

to the counterclaim controversy. The proof of this is established by the fact that Dragor, in its third party claim against Union, did not join and never attempted to join Isbrandtsen as a party. Isbrandtsen's presence in the Connecticut action therefore would not aid a determination of the controversy between Union and Dragor. He was a mere guarantor, or surety, and as such could not avail himself of a claim of Dragor against Union. *United States v. Berger,* 24 F.R.D. 136 (D.C. Cal., 1959); *Construction Management Corporation* v. *Brown & Root, Inc.,* 229 N.Y.S. 2d 70 (1962).

Dragor also urged that Judge Zampano should assume the counterclaim litigation in order to relieve Dragor of the burden and costs of two litigations instead of one. The fact of the matter, however, was that Dragor became involved in litigation with Union in Connecticut only by virtue of its filing its Arizona counterclaim as a permissive third party claim. It alone created the situation where litigation existed in two forums; it then sought to assert as grounds for discontinuing the Arizona counterclaim its conduct in creating concurrent and vexatious litigation in Connecticut.

As a final consideration, it should be remembered that all of this Missile Base construction contract litigation was brought to this forum by Dragor. Union's original action to recover the amounts expended in completing the joint venture's work was initially filed in the United States District Court for the Northern District of Illinois, Eastern Division. It was Dragor who appeared in that action and secured a transfer of the case pursuant to 28 U.S.C. Section 1404(a) to the Arizona District Court. When then seeking a transfer of the same controversy to Arizona, Dragor's president, by affidavit, stated in part as follows:

"It is clear that Illinois has no connection

with this litigation. The project, and witnesses, and the documents are in Arizona . . . This court does not have and cannot obtain jurisdiction over IMI, without which there will be mere circuity of litigation. In this action all three parties are subject to the jurisdiction of the Arizona District Court in Tucson, Arizona, or the California District Court, Southern District of California, Central Division.

"It is clear from the foregoing that the interest of justice would certainly best be served by a transfer of this action to the State of the project, to-wit: the appropriate United States District Court in Tucson, Arizona . . .

"Plaintiff is authorized to do business and has an agent for the receipt of process in both Arizona and California, and so does the defendant. Thus it is clear that all three parties would be before the court in either Arizona or California with the attendant facility of trial, from a trial facility point of view, heavily weighted in favor of Arizona."

Just as in the construction controversy in the original action filed by Union in Illinois and transferred to Arizona at Dragor's request, the counterclaim here concerns claims for equitable adjustment against the United States arising out of work performed in Tucson, Arizona and the prosecution of such claims before the Corps of Engineers. This fact makes the District Court in Tucson, Arizona the appropriate forum for resolving this controversy. The same type of problems concerning the manner of construction, the time scheduling, change orders on the project, impact and acceleration problems, joint occupancy problems, all are present in the counterclaim controversy just as in the original action. Therefore, for the very grounds stated by Dragor in the affidavit of its president made at the inception of all these proceedings, the counterclaim controversy should be tried

in Arizona. Indeed, trial in an East Coast forum would be so burdensome, in terms of transferring documents and producing witnesses having knowledge of the project problems, as to justify a transfer from Connecticut to Arizona in the interests of justice, pursuant to 28 U.S.C. Section 1404(a).

CONCLUSION

For each of the foregoing reasons, appellant Union Tank Car Company respectfully prays that this Court affirm the judgment of the United States District Court for the District of Arizona, sitting at Tucson, entered on December 7, 1965, dismissing for want of prosecution Dragor's counterclaim against appellee.

Respectfully submitted,
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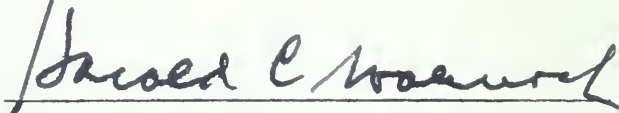
CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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